Filed 2/25/05 In re Carter W. CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re CARTER W., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, **Plaintiff and Respondent,** **v.** **CARTER W.,** **Defendant and Appellant.**	**A107047** **(Contra Costa County Super. Ct. No. J01-01847)**

Carter W. appeals the dispositional order committing him to the California Youth Authority (CYA) after the juvenile court sustained a sixth supplemental petition that charged him with two counts of resisting an executive officer. (Pen. Code, § 69.) He contends the disposition is an abuse of discretion.

BACKGROUND

Original Petition

Appellant first became a ward of the juvenile court in September 2001 at age 13, after he pled no contest to one count of petty theft: taking money from an open cash register at a movie theater. At the dispositional hearing appellant was placed on juvenile electronic monitoring for 45 days and ordered to complete nine work details.

Supplemental Petition

A January 2002 supplemental petition alleged appellant had stolen a necklace from a department store and had vandalized a public middle school. Both incidents occurred before the disposition of the original petition. Appellant pled no contest to both allegations, was continued as a ward of the court and was ordered to complete 18 work details, pay a fine and restitution, and spend a weekend in juvenile hall. His commitment to Orin Allen Youth Rehabilitation Facility (OAYRF) was suspended.

In April 2002, appellant admitted violating his probation by failing to turn himself in to the juvenile hall for his scheduled weekend in custody. He was ordered to serve two weekends at juvenile hall.

In May 2002, appellant admitted violating his probation by again failing to appear for one of the scheduled juvenile hall weekends. He admitted the violation and was ordered to complete 19 work details.

Second Supplemental Petition

A June 2002 second supplemental petition alleged two counts of petty theft: stealing a knife from a department store and a tape deck from a vehicle. Appellant was also alleged to have violated probation by failing to complete his work details and attend school, and by being suspended from school. In July 2002, appellant, then age 14, admitted both petty theft counts and the probation violations. He was placed on juvenile electronic monitoring and ordered to appear for disposition on August 12, 2002. A bench warrant issued after he ran away from home on July 28, 2002.

Appellant was arrested in August 2002 while riding as a passenger in a stolen vehicle. He was detained in juvenile hall for three weeks and then released to the custody of his mother and placed on juvenile electronic monitoring. During the next several weeks appellant failed to keep in contact with his probation officer and to attend school, and he violated his monitoring agreement. A bench warrant issued when he failed to appear at a home supervision violation hearing.

Following his arrest and the October 2002 dispositional hearing, appellant was committed to OAYRF for a maximum of six months.

Third Supplemental Petition

In November 2002, appellant pled no contest to two counts of second degree burglary: breaking into a locked car. Both incidents occurred while appellant was "at large" in September and October 2002. Four other counts of breaking into a locked car or unlawfully attempting to take a car were dismissed. The court ordered his OAYRF commitment extended by 60 days and ordered him to pay a $200 restitution fine.

Appellant's performance at OAYRF was unsatisfactory. He had difficulty adhering to its rules, struck another resident in the face, was disrespectful to staff, had conflicts with peers, refused to attend treatment classes or follow staff directions, and was generally disruptive. As a consequence, he did not earn any early release points. He was released on June 11, 2003, and placed on 90-day parole.

Fourth Supplemental Petition

On July 8, 2003, appellant, now age 15, was arrested for auto theft. He was seen in the auto several hours past his curfew. His parole status was terminated, and he was committed to juvenile hall for 30 days.

Appellant was released from juvenile hall in August 2003. In September 2003, he was alleged to have violated probation by failing to attend school, testing positive for marijuana, and being suspended from school for defying school authorities.

In October 2003, appellant pled no contest to one count of second degree vehicle burglary and one count of unlawfully attempting to take a vehicle, as alleged in an amended fourth supplemental petition. Following the February 2004 dispositional hearing, appellant was committed to OAYRF for a mandatory nine months. He was also ordered, inter alia, to attend anger management and family counseling classes, pay a restitution fine, and not to possess burglary tools or weapons.

Fifth Supplemental Petition

A fifth supplemental petition was filed in December 2003, between appellant's October 2003 no contest plea to the amended fourth supplemental petition and its February 2004 disposition. The fifth supplemental petition alleged two counts of second degree robbery with a great bodily injury enhancement, one count of assault with a great

bodily injury enhancement, and one count of carjacking. Following a contested hearing the court dismissed all counts, due to insufficient evidence.

Sixth Supplemental Petition

The sixth supplemental petition, which is the subject of this appeal, was filed in March 2004. It alleged two counts of preventing an executive officer from performing his or her official duties. Appellant admitted the first count and admitted the second count as a probation violation.

a. *Predisposition Report*

The following information is taken from the probation report prepared for the disposition of the sixth supplemental petition. Appellant arrived at OAYRF on March 1, 2004, pursuant to the disposition of the amended fourth supplemental petition. The following day, during the evening "free play," he engaged in extremely disruptive behavior, failed to follow staff directions, used excessive profanity, was defiant and disrespectful, tried to incite other wards to disobey staff, and informed the staff he did not intend to participate in the OAYRF program. As a result, the OAYRF staff decided to return him to juvenile hall.

Almost immediately after counselors Israel Carrero and Shannon Wittmeyer began the 50 minute drive to juvenile hall, appellant and the three other wards in the security van began to engage in very disruptive behavior, including derogatory remarks to the counselors. Appellant threatened to "'kill'" the two counselors once he was "'on the outs.'" The disruptive behavior continued for the duration of the drive.

The assistant superintendent of OAYRF rejected appellant for recommitment based on his lack of desire to return and on the serious nature of the offenses alleged in the sixth supplemental petition. After meeting with appellant and reviewing his case history, the probation department's placement panel found that his ongoing delinquent activity, anger control problems, and failure to respond to the corrective devices of the OAYRF program made him a threat to himself and others, thus warranting continued rehabilitative intervention. The placement panel opined that appellant's past violations and present activity, involving the very serious threats to the two counselors,

demonstrated that he posed a risk to community safety, and his behavior strongly suggested a recommendation of commitment to CYA. However, the panel felt that CYA commitment "might be premature at this time" because the panel deemed him an appropriate candidate for placement services, an as-yet untried rehabilitative course of action.

As the panel elaborated, the most appropriate course of action, given appellant's problems and needs, was placement in a court-approved home or institution for an indefinite period. Such placement would hold him accountable for his conduct. It would also address his other pressing needs, including anger management and victim awareness counseling. He would be living in a structured and controlled environment where negative influences were few and the consequences of poor impulse control and weak anger management skills were not so severe. He would be isolated from the community, thereby safeguarding the public from his delinquent tendencies while affording him much needed punitive and rehabilitative intervention.

b. *Disposition*

At the June 2004 disposition hearing the court announced it had read and considered the probation department's report. After it considered all local less-restrictive programs and forms of custody, it found them inappropriate and concluded that appellant, now age 16, would benefit better from the programs provided by CYA. It therefore committed appellant to CYA for a maximum period of 56 months and 7 days, less 563 days of custody credit.

DISCUSSION

I. *Abuse of Discretion in Not Following Probation Recommendation*

Appellant contends the juvenile court abused its discretion in committing him to CYA, in light of the probation department's recommendation of the less restrictive placement in a group home or institution.

A commitment to CYA, like all placements in juvenile matters, is reviewed for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision. (*In re Angela M*. (2003) 111 Cal.App.4th 1392, 1396.) Placement of the

juvenile need not follow any particular order, i.e., from least to most restrictive, nor does a court abuse its discretion by ordering commitment to CYA, the most restrictive placement, before other options have been tried. (*In re Eddie M*. (2003) 31 Cal.4th 480, 507.) Nevertheless, the record must demonstrate both a probable benefit to the minor by a CYA commitment and the inappropriateness or ineffectiveness of a less restrictive alternative. (*Angela M., supra,* 111 Cal.App.4th at p. 1396*.)*

We find no abuse. The Juvenile Court Law (Welf. & Inst. Code, § 200 et seq.), which governs minors whose conduct has been found delinquent, has a dual purpose: (1) protection and safety of the public, and (2) rehabilitation of the minor through care, treatment and guidance that is consistent with the minor's best interest, holds him accountable for his behavior, and is appropriate for the circumstances. (Welf. & Inst. Code, § 202, subds.(a) & (b).) "This guidance may include punishment that is consistent with the rehabilitative objectives" of the Juvenile Court Law. (Welf. & Inst. Code, § 202, subd. (b).)

Given appellant's criminal history and the nature of the current offense, the juvenile court could reasonably conclude that commitment to CYA was the most appropriate rehabilitation for appellant and the best protection of the public. At the time of this disposition appellant had been a ward of the juvenile court for three years. His offenses were becoming increasingly dangerous to persons and property. He was having greater difficulty adhering to the terms of probation while out of custody. His performance during his first commitment to OAYRF was so unsatisfactory he did not acquire any early release points, and he was immediately disruptive when he was returned to OAYRF for a second commitment. According to the predisposition report in the instant matter, appellant continued to deny all of his behavior at OAYRF that caused the staff to return him to juvenile hall, e.g., disruptive behavior, refusal to follow staff directions, excessive profanity, etc., and he "adamantly" denied threatening either counselor during the van ride to juvenile hall. Based on these denials, the court concluded that appellant was taking "absolutely no responsibility" for his threats, despite those threats having been established via the sustained charges.

Although the probation department ultimately recommended placement in a court-approved home or institution as a "last chance," it noted that it had strongly considered recommending CYA placement, in light of the risk to the community from his past violations and present delinquent activity. At the dispositional hearing the probation officer who prepared the predisposition report acknowledged that the argument for committing appellant to CYA was as strong as placing him in an approved institution. He also affirmed, as he stated in his report, that appellant denied being disruptive, breaking rules, or refusing to follow instructions when he was at OAYRF.

Under these circumstances, we cannot say that the court, which specifically stated it had considered the less restrictive local programs and concluded the CYA programs would be more beneficial to appellant, abused its discretion in the CYA commitment.

II. *Abuse of Discretion in CYA Commitment Based on Earlier Warning*

Appellant contends commitment to CYA was an abuse of discretion given the court's (Judge Spanos) statement at a previous hearing that if appellant appeared in his courtroom again, appellant would be committed to CYA. Appellant acknowledges there is no reported transcript containing such a statement. He bases it on comments by counsel at the instant dispositional hearing.

At the outset of the June 3, 2004 dispositional hearing, appellant's attorney (Wright Morton) made, at appellant's behest, a peremptory challenge of Judge Spanos, who had presided over the January 2004 contested jurisdictional hearing on the fifth supplemental petition and the February 2004 dispositional hearing on the fourth supplemental petition.[1] Neither Morton nor Dana Filkowski, the prosecutor of the instant (sixth supplemental) petition, had participated in the January or February 2004 hearings. The June 3 hearing was continued to June 17 to permit further research on the issue of the timing and availability of a peremptory challenge.

During discussions of the peremptory challenge at the continued hearing on June 17, prosecutor Filkowski commented: "[M]y understanding from talking to Mr. Morton at the [June 3] hearing , is that you [Judge Spanos] warned this minor [sometime before

[1] Morton waived appellant's appearance at the June 3 hearing.

the incident that resulted in the sixth supplemental petition] that if you saw him again, he was looking at going to CYA. And in spite of that warning, it took him less than a day to commit these new violations."

Defense Attorney Morton then explained that after a May 28, 2004 hearing on the instant (sixth supplemental) petition, appellant told him that Judge Spanos "had in fact told [appellant] that if [Judge Spanos] ever saw [appellant] again that [appellant] was going to YA." Morton added, "Although as the Court indicated on May 28th when you asked that the probation officer be present and that the time calculations be done, [] you were not by that saying that YA would be imposed, but that it was an option. And I believe that the Court can exercise its discretion despite the earlier comment to my client."

Appellant subsequently withdrew his peremptory challenge, and prosecutor Filkowski then argued in favor of CYA commitment rather than the probation department's recommendation of placement in a court-approved home or institution. During her argument she stated: "[Appellant] constantly acquires new law violations. And even after this Court told him if I see you again you're going to the Youth Authority, he engaged in this very serious, disruptive and violent conduct" toward the two OAYRF counselors.

Defense Attorney Morton and the probation officer then argued in favor of appellant's placement at "Summit," a secured facility, and Judge Spanos asked them several questions about the Summit staff and program.

In her rebuttal, Prosecutor Filkowski, arguing against such placement, stated: "It appears as if the Court is actually seriously considering placement as an option. [¶] [¶] At this point, rehabilitative programs have had absolutely no impact on deterring this minor from additional law violations. . . .And I think what we're left with in our repertoire is simply punishment as a tool for deterring him, and that was what you saw when you looked at him last time, your Honor, and you said if I see you again it's YA. [¶] And I think if you make that statement to a kid that next time you're going [to YA],

and you get a case like this and you don't send him, there's absolutely no credibility for this Court."

Appellant contends the court erred in committing him to CYA based on the purported earlier ultimatum.

Appellant correctly observes that a juvenile court cannot predetermine dispositional issues prior to a dispositional hearing. (*In re Jorge Q*. (1997) 54 Cal.App.4th 223, 238.) Rather, it is required to examine the entire dispositional picture whenever the minor appears for disposition; it cannot treat an earlier order as self-executing or automatic. (*Ibid*.)

Nevertheless, even assuming Judge Spanos warned appellant during some earlier appearance that he would be committed to CYA if he ever again appeared before Judge Spanos--a warning neither Defense Attorney Morton nor Prosecutor Filkowski ever heard--nothing in the record suggests Judge Spanos committed appellant to CYA simply because he had once issued this warning. Rather, the record makes clear that Judge Spanos reached his dispositional decision only after a review of appellant's entire history and the specifics of the instant offenses and a consideration of the various dispositional alternatives.

In any case, there is no proscription against Judge Spanos's language. "'Of course, the threat of [CYA] commitment may have a salutary effect on a particular minor's attitude, and nothing [should] restrict the court's ability to employ such a threat to encourage the minor's reform'" and to serve as a deterrent to subsequent delinquent behavior. (*In re Kazuo G*. (1994) 22 Cal.App.4th 1, 9.)

DISPOSITION

The order is affirmed.

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Jones, P.J.

We concur:

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Stevens, J.

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Simons, J.